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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1533

JULIUS EPSTEIN, PETITIONER

v.

STANLEY RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-25) is reported at 421 F.2d 930. The opinion of the district court (Pet. App. 26-34) is reported at 296 F. Supp. 214.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1970. The petition for a writ of certiorari was filed on May 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requested file, which is security-classified pursuant to Executive Orders 10501 and 10964, falls within the exemption in the Freedom of Information Act for matters that are "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

STATUTE INVOLVED

In pertinent part, the public information section of the Administrative Procedure Act (the "Freedom of Information Act"), P.L. 90-23, 81 Stat. 54 (5 U.S.C. (Supp. IV) 552 *et seq.*), provides:

> Public information; agency rules, opinions, orders, records, and proceedings.
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
>
> * * * *
>
> (b) This section does not apply to matters that are—
>
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.
>
> * * * *

STATEMENT

1. For a number of years petitioner has been attempting to obtain the disclosure to him of a file which he describes as "Army document: 'Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul,' " File No. 383.7-14.1 (R. 29).[1] Petitioner's requests were denied because of the "current high security classification of the file" (R. 185-193). After Congress enacted the Freedom of Information Act, which became effective on July 4, 1967, petitioner invoked that statute in support of his request for disclosure (R. 35, 46). That request was also denied, on the ground that the requested file is exempt from disclosure under the Act as matter which, under 5 U.S.C. 552(b)(1), is "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" (R. 24-52).

Petitioner thereafter brought this action in the district court, pursuant to the Freedom of Information Act, to compel the respondents to disclose the requested file to him (R. 1-2). The district court granted a motion for summary judgment and dismissed the action, on the ground that the respondents had appropriately invoked the foregoing exemption (Pet. App. 26-34). The court of appeals affirmed, holding that "[t]he origin of the file's contents itself is sufficient to dispel any suggestion that the original classification was arbitrary or capricious," and that the respondents had "made more than a sufficient showing" that questions bearing on "the continuing

[1] "R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

need for secrecy * * * persist and require resolution by the executive" (Pet. App. 25).

2. The basis of the security classification of the requested file is set forth in an affidavit of Major General Kenneth G. Wickham, Adjutant General of the Army (R. 23-27). The Allied Force Headquarters ("AFHQ") was the unified inter-allied command (British and American) that planned and supervised ground, air, naval and service operations and military government during World War II in the North African Theatre of Operations and later the Mediterranean Theatre.[2] After AFHQ was discontinued, the Combined Chiefs of Staff[3] directed that AFHQ's original records be transferred to the British Government and that microfilm copies of the records be released to the War Department of the United States Government. The Adjutant General's affidavit states that the file requested by petitioner is part of the foregoing AFHQ records that were released to the United States War Department by the Combined Chiefs of Staff, and that the requested file, as re-

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[2] See *Federal Records of World War II, Vol. II, Military Agencies,* (G.S.A., 1951), pp. 767, 769.

[3] The Combined Chiefs of Staff was established by the President of the United States and the British Prime Minister as a result of a United States-United Kingdom military staff conference held shortly after Pearl Harbor. The Combined Chiefs of Staff, which continued throughout the war, reported to the President and the Prime Minister. It collaborated in the formulation and execution of policies and plans concerning the strategic conduct of the war, the broad program of war requirements, the allocation of munitions resources, and the requirements for overseas transportation for the fighting services of the allied nations. See *Federal Records of World War II, Vol. II, Military Agencies, supra,* pp. 2-3.

ceived by the War Department, was classified as "Top Secret" since it contained many individual "Top Secret" documents of combined (British and American) and British origin. The Adjutant General's affidavit further states that the requested file, in the possession of the United States Government, has continued to be security-classified because of the requirements of Executive Orders 10501 and 10964 (see Pet. App. 22; R. 24, 26-27).[4]

Executive Order 10501, as amended by Executive Order 10964, requires the security classification of, and exempts from automatic downgrading or declassification, certain defined categories of information, including defense "[i]nformation or material originated by foreign governments or international organizations and over which the United States Goverment has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography."[5] Army Regulation 380-6, which implements these executive orders, lists the "Combined Chiefs of Staff" as an example of an international organization which is outside the jurisdiction of the United States (R. 161).[6]

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[4] The file is stored in the National Archives (R. 23). A great number of other classified documents are also stored in the National Archives and its record centers, including documents dating to 1966.

[5] Section 3 of 18 Fed. Reg. 7049, 3 C.F.R. (1949-1953 Comp.) 979; Section 4(a)(1) of 26 Fed. Reg. 8932, 3 C.F.R. (1959-1963 Comp.) 486.

[6] The common understanding that the Combined Chiefs of Staff is an "international" group is also evidenced by Depart-

Executive Orders 10501 and 10964 forbid the disclosure to petitioner of the requested file for two reasons. First, the file was received by the United States Government from the Combined Chiefs of Staff, an "international" organization, as a security-classified "defense" document, and the British Government (the other member of the Combined Chiefs of Staff) has refused to remove the security classification of the file.[7] Second, independently of the international nature of many of the papers in the file,[8] we are informed by the Department of the Army that the file has been security-classified, pursuant to Executive Orders 10501 and 10964, because of considerations of intelligence and cryptography (see Section 4(a)(1) of Executive Order 10501, as amended by Executive Order 10964). It should also be added, as the court of appeals noted (Pet. App. 24-25), that the Department of the Army has reviewed the file continuously, in cooperation with other agencies of the United States Government, in the hope that a procedure could be developed to declassify all, or a portion of, the papers in the file (see R. 24-52, 185-193). To date, how-

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ment of Defense Directive 5200.10, p. 5 (July 26, 1962), and Department of Defense Directive 5200.9, p. 4 (September 27, 1958).

[7] As a result of recent inquiries by the United States Government, the British Government has agreed to change the file's classification from "Top Secret" to "Secret". However, the British Government has refused to remove entirely the security classification (now "Secret") of the file.

[8] As noted below, certain of the papers were originated solely by the United States Government and are subject to disclosure by the United States to the extent that other security considerations (*e.g.*, cryptography and intelligence) are not applicable.

ever, those efforts have yielded only the declassification of four United States-originated items, involving no problems of intelligence or cryptography, which were furnished to petitioner on August 22, 1969.*

ARGUMENT

The Freedom of Information Act expressly exempts from its coverage matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" (5 U.S.C. 552(b)(1)). The court of appeals was plainly correct in holding that this exemption applies to the file sought by petitioner. The requested file—which pertains to "defense" information—was received by the War Department of the United States Government from the Combined Chiefs of Staff (an "international" organization composed of British and American representatives) as a security-classified document. And, insofar as the file contains papers originated by the British Government (the other member of the Combined Chiefs of Staff), Executive Order 10501, as amended by Executive Order 10964, forbids the disclosure of the file until such time as the British Government agrees to remove the security classification. Certainly, our nation's foreign policy cannot be conducted effectively if it fails to honor its

* The fact that these items (reprinted in Appendix A to the brief of the *amicus curiae* in the court of appeals) were originated solely by the United States Government permitted the United States to disclose them to petitioner once it was determined that United States intelligence and cryptography considerations were not an obstacle to disclosure.

international commitments." Moreover, independently of the international nature of the file, the foregoing executive orders forbid the disclosure of the file because of considerations of intelligence and cryptography.

There is no merit in petitioner's contention (*e.g.*, Pet. 10) that the courts below should have reviewed the correctness of the executive judgment that documents of the type here involved must be kept secret in the interest of the national defense or foreign policy. As the court of appeals noted, under the exemption involved here the "function of determining whether secrecy is required in the national interest is expressly assigned to the executive," and "[t]he judicial inquiry is limited to the question of whether an appropriate executive order has been made as to the material in question" (Pet. App. 24). The correctness of this reading of the Act is confirmed by the express language of the exemption, by its legislative history,[11] and by the settled principle of judicial

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[10] 5 U.S.C. 552(b)(4), another exemption provision, explicitly recognizes the obligation of the United States Government to honor the confidentiality of documents submitted by *private citizens*. *See General Services Administration* v. *Benson*, 415 F.2d 878, 881 (C.A. 9). *A fortiori*, the government must honor its *international* commitments.

[11] See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess., pp. 9-10; 112 Cong. Rec. 13659 (Rep. Gallagher). Moreover, Representative Moss, Chairman of the House Government Information Subcommittee, stated, during Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March 30, 1965, pp. 14-15, that:

[Footnote continued on page 9]

refusal to review the discretion of the executive in the areas of national defense and foreign relations. See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320-322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318.

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[11] [Continued]

We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. *Now, that is very broad.* That means that *any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other nations can, by appropriate designation, be excluded from the provisions of this act.*

We recognize that there are going to be certain needs to keep some of this information locked up. And *the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classification* * * *.

* * * *

The whole object of the Executive order is to have a category in which you can place and identify this information, so that it is secure.

Now, what hardship is imposed there? What infringement of the Executive right or responsibility is diminished by this provision of the proposed legislation? [Emphasis added.]

Representative Moss also stated during the House hearings that 5 U.S.C. 552(b)(1) "was intended to specifically recognize that Executive order [No. 10501]" (*id.* at 52), and is drafted "in conformity with that Executive order" (*id.* at 105).

Finally, we note that petitioner can derive no comfort from *United States* v. *Reynolds*, 345 U.S. 1. The *Reynolds* case antedated the Freedom of Information Act and concerned instead a formal claim of executive privilege asserted by the government as a defense to discovery in a Tort Claims Act suit. The claim of executive privilege was sustained by this Court, without requiring *in camera* inspection, where there were circumstances "indicating a reasonable possibility that military secrets were involved • • •" (345 U.S. at 10-11). The instant case, however, involves an explicit exemption to the Freedom of Information Act which, Congress made clear, is independent of the doctrine of executive privilege (see note 11, *supra*). Moreover, as the court of appeals correctly concluded, the government in the instant case has appropriately established that the file requested by petitioner falls within the exemption to the Act on which it relied.[12]

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[12] We recognize that, under the Freedom of Information Act, "the burden is on the agency to sustain its action" in denying disclosure (5 U.S.C. 552 (a) (3)). The House Government Operations Committee explained that "[t]he burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." H. Rep. No. 1497, 89th Cong., 2d Sess., p. 9. The Senate Judiciary Committee similarly explained that the burden of proof provision was added because the individual "will not know the reasons for the agency action." S. Rep. No. 813, 89th Cong., 1st Sess., p. 8. But here the government has explained why the file sought by petitioner falls within 5 U.S.C. 552(b) (1). Moreover, petitioner's claim under the Act is not affected by his status as a historian. Indeed, one of the funda-

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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JUNE 1970.

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fental purposes of the Act was to eliminate the test of whether an individual is "properly and directly concerned" (see S. Rep. No. 813, *supra*, pp. 5-6; H. Rep. No. 1497, *supra*, p. 1).

In any event, pursuant to Executive Order 10816 certain kinds of classified documents can be made available for use by scholars; in the instant case, however, a determination was made that, because of the highly sensitive nature of the requested file, no such exception could be made here (see R. 193).

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